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No. 84-320

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES; and LODGE GRASS SCHOOL DISTRICT NO. 27,
Petitioners,

v.

CROW TRIBE OF INDIANS; LEROY SAGE, a minor; FLORA NOT AFRAID, his guardian; THE TRIBAL COURT OF THE CROW INDIAN RESERVATION; EDDIE ROUNDFACE, GLEN BIRDINGROUND, and IRA LEFT HAND, Judges of the Tribal Court of the Crow Indian Reservation; CROW INDIAN TRIBAL COUNCIL; and DONALD STUART, Chairman of the Crow Indian Tribal Council,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Respondents' briefs in opposition to the Petition[1] make no effort to contest petitioners' showing that this case presents important and recurring questions concerning the

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[1] Brief for Respondents Crow Tribe of Indians and Crow Tribal Officials in Opposition, dated October 29, 1984 (hereinafter "Tribe Opp. Br."); and Reply in Opposition to Petition for Certiorari, dated October 26, 1984 and filed on behalf of respondents Leroy Sage and Flora Not Afraid (hereinafter "Sage Opp. Br.").

role of the federal courts in protecting non-Indians from abuses of tribal court jurisdiction.[2]

Thus, as effectively conceded by respondents and detailed in the *amici curiae* briefs filed on behalf of ten different States,[3] the Ninth Circuit's decision below will have broad legal and commercial consequences because of the extensive interface between Indian and non-Indian interests on reservations throughout this Nation, and because of the ever-wider jurisdictional claims being made increasingly by Indian tribal courts. Pet. at 11-14; Nine States Br. at 2-4; Washington State Br. at 2-3; Glacier Country Br. at 3. Nor can respondents dispute the fact—spotlighted by Justice Rehnquist's opinion in chambers granting petitioners' Application for Stay[4]—that the decision of the Court of Appeals marks an abrupt departure from the long history of federal court review of the powers of Indian tribal government *vis-a-vis* the State and Federal Governments

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[2] *See* Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, dated August 29, 1984 and filed on behalf of petitioners National Farmers Union Insurance Companies, *et al.* at 8-14 (hereinafter "Pet.").

[3] Brief of Nine *Amici Curiae* States in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, filed on behalf of Montana, Arizona, Minnesota, North Carolina, North Dakota, Oklahoma, South Dakota, Wisconsin and Wyoming (hereinafter "Nine States Br."); Brief of Amicus Curiae State of Washington in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit (hereinafter "Washington State Br."); and Brief of Glacier County, Montana and of the East Glacier County Water and Sewer District as Amicus Curiae in Support of Petition (hereinafter "Glacier County Br.").

[4] *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, No. A-123, slip op. (September 10, 1984) (Rehnquist, J., in chambers) (hereinafter "Stay Ruling").

Because Justice Rehnquist's opinion was issued after the filing of the Petition, petitioners have reproduced it in a Supplemental Appendix (hereinafter "Pet. Supp. App.") to this Reply Brief.

and non-Indian citizens. Pet. at 9-10; Stay Ruling at 2-6 (Pet. Supp. App. at 2a-6a).

Rather than challenge the importance of the case,[5] respondents argue in essence that it was correctly decided below. Specifically, respondents claim that the Court of Appeals correctly interpreted this Court's decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), as imposing *sub silentio* dramatic new constraints on the traditional role of the federal courts in reviewing assertions of tribal authority. Tribe Opp. Br. at 6-7; Sage Opp. Br. at 3-6. Nonetheless, apparently recognizing that *Santa Clara Pueblo* may only preclude federal court review of *intra-tribal* disputes involving claimed violations of the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-41 (1982) (hereinafter "ICRA")(*see* Pet. at 14-15), respondents' primary argument is that the Ninth Circuit decision can somehow be interpreted as preserving petitioners' federal remedies *after* the tribal court has first ruled on the matter. Tribe Opp. Br. at 7-12; Sage Opp. Br. at 6-13.

We demonstrate below that these arguments are misplaced and in fact spotlight the need for plenary review by this Court of both of the questions presented in the Petition. We also show that at a minimum, the Petition in this case should be held pending disposition of *R.J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3846 (U.S. April 27, 1984) (No. 83-1811), which the Court of Appeals found dispositive of this case. 736 F.2d at 1322 (Appendix to Petition for Writ of Certiorari (*see* n.2) at 4a-5a (hereinafter "Pet. App.")).

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[5] The important and recurring nature of the questions presented is, of course, sufficient by itself to justify granting the Petition. *See, e.g., U.S. v. Powell*, 330 U.S. 238, 240 (1947); *U.S. v. Standard Oil Co.*, 332 U.S. 301, 303 (1947); *Patterson v. Lamb*, 329 U.S. 539, 541 (1947)

I. Although Effectively Conceding the Importance of the Questions Presented, Respondents Do Not and Cannot Demonstrate That Congress Has Granted To Indian Tribes or Their Courts the Unreviewable Power To Determine Their Own Jurisdiction *Vis-A-Vis* the Federal and State Governments and Non-Indian Citizens.

Although respondents argue that *Santa Clara Pueblo* precludes federal court review of tribal court assertions of civil jurisdiction over non-Indians, they can identify nothing in Justice Marshall's opinion for the Court that supports the sweeping new restrictions imposed by the Ninth Circuit here. Respondents point only to the Court's recognition that Congress intended to "protect tribal sovereignty" when it enacted the ICRA (Tribe Opp. Br. at 6; *see also* Sage Opp. at 4-6), while altogether failing to mention that the *scope* of tribal sovereignty is precisely the issue presented in this case. As Justice Rehnquist's opinion in chambers makes clear, it is one thing to make tribal courts the exclusive forum for resolving an alleged "violation of [the] terms" of the ICRA or other intra-tribal controversies over which the tribal court's jurisdiction is unquestioned; it is quite another to hold, as the Ninth Circuit did, that a tribal court also has the untrammeled power to "decide[] a federal question as to the extent of its jurisdiction." Stay Ruling at 4, 6 (Pet. Supp. App. at 4a, 6a).

Indeed, both the ICRA and this Court's decision in *Santa Clara Pueblo* make clear that Congress did not intend to delegate to Indian Tribes and their courts the unconstrained power to determine their own jurisdiction over non-Indians. The Act itself recognizes that Indian tribes are "subject to the jurisdiction of the United States" (25 U.S.C. § 1301(1)), and in any event applies only to tribes "exercising [the] powers of *self*-government." *Id.* § 1302 (emphasis supplied). *Santa Clara Pueblo* confirms that the ICRA "represents an exercise" of Congress' "plenary authority to limit, modify or

eliminate the powers of *local self-government* which the tribes otherwise possess" to regulate "'*internal and social relations.*'" 436 U.S. at 55-57 (emphasis supplied, citations omitted). In other words, while Congress may have precluded federal court review of the merits of tribal decisions concerning intra-tribal controversies plainly within their jurisdiction, there is no indication in the ICRA or in *Santa Clara Pueblo* that Congress granted to tribes and tribal courts the unfettered power to expand their authority *vis-a-vis* the Federal or State Governments or non-Indian citizens.[6]

II. Respondents' Misplaced Reliance on an "Exhaustion" Doctrine Not Imposed by the Ninth Circuit Underscores the Need for Plenary Review by This Court.

Apparently recognizing that there is a federal cause of action for abuse of tribal jurisdiction, respondents focus most of their attention on the issue of "exhaustion of available tribal remedies," arguing that this Court should decline review because the Ninth Circuit decison can somehow be read to allow petitioners to "reinitiate their suit in federal court" after the tribal court has addressed the controversy. Tribe Opp. Br. at 7-8. The difficulty with this position is that the Court of Appeals did not so rule. To the contrary, the majority opinion makes it quite clear that "exhaustion of tribal remedies" arguments were rendered irrelevant by its holding that petitioners' challenge to the jurisdiction of the tribal court "fail[ed] to state a claim for federal relief." 736 F.2d at 1323 & n.4 (Pet. App. at 7a). Indeed, the essence of the ruling was obvious enough to lead Circuit Judge Wright, concerned that "[t]he majority

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[6] As discussed below, the separate question of whether non-Indian litigants have a federal cause of action for violations of the ICRA is presented in a separate case pending before the Court. If the Court grants review and holds that such a federal claim exists, the decision below in this case should of course be summarily reversed.

... makes the tribal court the first *and last* arbiter of its own jurisdiction," to "dissent from the holding that we lack subject matter jurisdiction." 736 F.2d at 1324, 1325 (Pet. App. at 8a, 12a) (emphasis in original).

Consequently, respondents' "exhaustion" and "comity" arguments implicitly recognize that this case was incorrectly decided below and only serve to highlight the need for prompt review by this Court. They are appropriately raised, if at all, only on the merits.

In any event, respondents' contention that "exhaustion" and "comity" principles should be extended to the present circumstances is without merit. Since, as respondents concede, the federal courts lack appellate power to directly review the judgments of Indian tribal courts (Sage Opp. Br. at 13-14; *see also* Stay Ruling at 6 (Pet. Supp. App. at 6a)),[7] petitioners might well be conclusively bound if they were forced to submit their jurisdictional challenge to the tribal court in the first instance. *Cf. Durfee v. Duke*, 375 U.S. 106 (1963).[8] Even if "exhaustion" principles had some

[7] Respondents Sage and Not Afraid do make the novel argument that the Supreme Court has direct appellate jurisdiction, supposedly granted by the Constitution, to review Indian tribal court judgments. Sage Opp. Br. at 8-13. Quite apart from the fact that the decisions cited appear to directly negate this contention (*id.* at 9-11), the Ninth Circuit certainly did not accept it and accordingly, like the "exhaustion" argument, it is appropriately raised only on the merits.

[8] Such preclusion might be found if, as *Santa Clara Pueblo* suggests, "full faith and credit" is extended to tribal court judgments in some circumstances. 436 U.S. at 65, 66 n.21. If "full faith and credit" are not due tribal court decisions on jurisdictional matters, "exhaustion" is of course a pointless exercise.

application here (which they do not),[9] it is well-settled that (i) "exhaustion" applies to administrative, but not judicial, remedies, *Gibson v. Berryhill*, 411 U.S. 564, 574 n.13 (1973), and (ii) only "adequate" administrative remedies need be exhausted. *Id.* at 575 n.14; *Lane v. Wilson*, 307 U.S. 268, 274-75 (1939). The Crow Tribe's own Opposition Brief in this Court leaves no doubt about the futility of requiring petitioners to exhaust Crow Tribal Court remedies in this case: "[t]ribal jurisdiction over disputes such as this one is an essential aspect of the retained sovereign power of the Crow Tribe." Tribe Opp. Br. at 14.

III. The Court Should Also Grant Review of Petitioners' Second Question Concerning the Scope of the Tribal Court's Jurisdiction.

The Crow Tribe respondents argue that review of the second question presented in the Petition should be denied because it was "not reached by the Ninth Circuit." Tribe Opp. Br. at 12-13. While it is true that the Ninth Circuit found it unnecessary to reach this issue, the question was fully briefed and the majority opinion does address it in some detail—to the point of articulating a test for the propriety of tribal court jurisdiction. 736 F.2d at 1322 & n.3 (Pet. App. at 4a). Accordingly, a remand to the Ninth Circuit following review by this Court of the threshold question of federal remedies would be a pointless exercise.

[9] Apart from lower federal court decisions that were implicitly overruled by *Santa Clara Pueblo*, respondents cite only cases involving federal court refusals to interfere with *state* court civil and criminal prosecutions. Tribe Opp. Br. at 8-9; Sage Opp. Br. at 13-14. What respondents neglect to mention is that these decisions are predicated on the Federal Anti-Injunction Act, 28 U.S.C. § 2283, which by its terms applies only to state court proceedings. The Act has previously been held to be ineffective to prevent a federal court injunction against tribal courts acting in excess of their jurisdiction. *See, e.g., U.S. v. Blackfeet Tribe of the Blackfeet Indian Reservation*, 369 F. Supp. 562, 565 (D. Mont. 1973).

Moreover, the issue was thoroughly addressed (correctly, we believe) by the District Court below (*see* Pet. at 3-5; pet. App. at 18a-24a), and has been decided in a wide variety of factual contexts by other lower federal courts. Pet. at 11-13 (citing cases). *See also* Glacier County Br. at 3-10; Washington State Br. at 3-6.

Given the concededly important and recurring nature of the issues presented, the better and more efficient course would be to grant review on both questions presented by the Petition. *Cf. Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 473-74 (1947) (Although the Court of Appeals failed to reach an important issue, remand on that issue was deemed unwarranted when the District Court had reached the issue and it was fully briefed and argued to the Supreme Court.); *Ecker v. Western Pacific R.R. Corp.*, 318 U.S. 448, 489 (1943); *New York Transit Authority v. Beazer*, 440 U.S. 568, 583-84 n.24 (1979).

CONCLUSION

For the reasons stated above and in the Petition, petitioners respectfully ask that a writ of certiorari be issued to review the decision of the Ninth Circuit in this case. Not only are important and recurring federal questions concerning the rule of the federal courts in resolving questions of Indian tribal sovereignty presented, but in addition the Ninth Circuit decision below incorrectly interprets this Court's decision in *Santa Clara Pueblo* as announcing a sharp reduction in the federal role that cannot be squared with decisions such as *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) and *Montana v. United States*, 450 U.S. 544 (1981).

In the event that the Court determines that the questions presented here do not merit review, it should at a minimum hold the Petition pending disposition of the petition for certiorari in *R.J. Williams Co.*, No. 83-1811,

which presents the separate question of whether non-Indian parties have a federal claim for violations of the ICRA. The majority opinion below found *R.J. Williams Co.* dispositive of the instant case. 736 F.2d at 1322 (Pet. App. at 4a-5a). If the Court accepts review in No. 83-1811 and holds that there is such a federal claim, this case should be summarily reversed and remanded.

Respectfully submitted,

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November 8, 1984

SUPPLEMENTAL APPENDIX

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SUPREME COURT OF THE UNITED STATES

No. A-123 (84-320)

NATIONAL FARMERS UNION INSURANCE COMPANIES ET AL., PETITIONERS *v.* CROW TRIBE OF INDIANS ET AL.

ON APPLICATION FOR STAY

[September 10, 1984]

JUSTICE REHNQUIST, Circuit Justice.

Applicants National Farmers Union Insurance Companies and Lodge Grass School District No. 27 request that I stay the mandate of the United States Court of Appeals for the Ninth Circuit which reversed the judgment of the United States District Court for the District of Montana. The latter court had enjoined the Crow Tribe of Indians from executing against the applicants on a judgment rendered by the Crow Tribal Court. The Court of Appeals for the Ninth Circuit held, as I read its opinion, that litigants who seek to challenge the exercise of jurisdiction by an Indian Tribal Court in a civil action have no federal court remedy of any kind. I have concluded that four Members of this Court are likely to vote to grant the applicants' petition for certiorari, and that the applicants have a reasonable probability for at least partial success on the merits if this Court grants certiorari. I have therefore decided that the temporary stay I earlier granted on August 21, 1984, pending consideration of a response, should be continued until this Court disposes of the applicants' petition for certiorari which was filed on August 29th.

In May, 1981, Leroy Sage, a Crow Indian school child, was struck by an uninsured motorcyclist on the property owned by applicant School District. The school is located on land within the external boundaries of the Crow Indian Reserva-

tion, but the land is owned by the State of Montana in fee subject to a reserved mineral interest in the Tribe. Sage sustained a broken leg, and filed suit against the School District in Crow Tribal Court.

Dexter Falls Down served process for Sage upon Wesley Falls Down; Wesley was a member of the school board. Wesley did not notify anyone of the summons and a default judgment for $153,000 was entered against the school three weeks later in Tribal Court. Actual medical bills came to $3,000. Petitioners became aware of the suit when the Tribal Court mailed a copy of the judgment to the school. Instead of seeking review of the default judgment in Tribal Court, applicants filed suit in the United States District Court for the District of Montana, alleging that the Tribal Court's exercise of jurisdiction violated Due Process and the Indian Civil Rights Act, 25 U. S. C. § 1302, *et seq.* (1982). Petitioners sought a permanent injunction against the execution of the Tribal Court judgment.

The District Court held that petitioners' complaint, based on federal common law, stated a claim under 28 U. S. C. § 1331 (1982). *National Farmers Union Insurance Co.* v. *Crow Tribe of Indians*, 360 F. Supp. 213, 214–15 (D. Mont. 1983). The District Court held that the Tribal Court lacked subject matter jurisdiction over Sage's claim, because the land upon which the court had occurred was not Indian land, and the defendants were not tribal members. The District Court relied on our decision in *Montana* v. *United States*, 450 U. S. 544, 565–66 (1981) in reaching this conclusion.

The Tribe appealed to the Court of Appeals for the Ninth Circuit, and that court reversed over a partial dissent. *National Farmers Union Insurance Co.* v. *Crow Tribe of Indians*, 736 F. 2d 1320 (9th Cir. 1984). The Court of Appeals reasoned on the authority of one of its prior decisions that "Indian tribes are not constrained by the provisions of the Fourteenth Amendment." It went on to determine that tribes are bound by the provisions of the Indian Civil Rights

Act, 25 U. S. C. § 1301 *et seq.* and that § 1302(8) of this Act requires that tribal courts exercise their jurisdiction in a manner consistent with due process and equal protection. But the court then concluded that since Congress had expressly limited federal court review of a claimed violation of the ICRA to a single remedy—the writ of habeas corpus—there could be no federal court review of any tribal court exercise of jurisdiction in a civil case. The Court of Appeals for the Ninth Circuit relied in part on our decision in *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 66–70 (1977) to reach this conclusion. The Court of Appeals recognized that our decision in *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191 (1978) had relied on principles of federal common law to determine whether a tribal court had exceeded its jurisdiction, but decided that our opinion the same term in *Santa Clara Pueblo*, *supra*, suggested a restriction on federal court review of Indian tribal jurisdiction as a result of the Indian Civil Rights Act. The Court of Appeals observed in a footnote that "should Sage seek to enforce his default judgment in the courts of Montana, National may, of course, challenge the Tribal Court's jurisdiction in the collateral proceedings. See generally *Durfee* v. *Duke*, 375 U. S. 106 (1963)." 736 F. 2d 1320, 1324 n. 5.

It is clear from proceedings in this case subsequent to the handing down of the opinion of the Court of Appeals that the respondents in this case have no intention of resorting to any state court proceedings in order to enforce the judgment of the Crow Tribal Court. After the issuance of the mandate of the Court of Appeals, tribal officials, at the behest of respondent Sage, seized 12 computer terminals, other computer equipment, and a truck from the school district. The basis for this seizure was said to be the Tribal Court judgment, and no state process was invoked.

If the Court of Appeals is correct in the conclusions which it drew in its opinion, the state of the law respecting review of jurisdictional excesses on the part of Indian tribal courts is

indeed anomalous. The Court of Appeals may well be correct that tribal courts are not constrained by the Due Process or Equal Protection Clauses of the Fourteenth Amendment; long ago, this Court said in *United States* v. *Kagama*, 118 U. S. 375, 379 (1886), and repeated the statement as recently as *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191, 211 (1978):

> "Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States, or the States of the Union. There exists in the broad domain of a sovereignty but these two."

But if because only the national and state governments exercise true sovereignty, and are therefore subject to the commands of the Fourteenth Amendment, I cannot believe that Indian tribal courts are nonetheless free to exercise their jurisdiction in a manner prohibited by the decisions of this Court, and that a litigant who is the subject of such an exercise of jurisdiction has nowhere at all to turn for relief from a conceded excess. Every final decision of the highest court of a state in which such a decision may be had is subject to review by this Court on either certiorari or appeal. 28 U. S. C. § 1257 (1982). Every decision of a United States District Court or of a court of appeals is reviewable by this Court either by way of appeal or by certiorari. *Id.*, §§ 1252–54; *cf.* § 1291. If the courts of the states, which in common with the national government exercise the only true sovereignty exercised within our Nation, *Kagama*, *supra*, are to have their judgments reviewed by this Court on a claim of erroneous decision of a federal question, it is anomalous that no federal court, to say nothing of a state court, may review a judgment of an Indian tribal court which likewise erroneously decides a federal question as to the extent of its jurisdiction. See *Montana* v. *United States*, *supra*. It may be that Congress could provide for such a result, but I have a good deal more doubt than did the Court of Appeals that it has done so.

Our decision in *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49 (1978), which the Court of Appeals read to support its conclusion, raised the question of whether a federal court could pass on the validity of an Indian Tribe's ordinance denying membership to the children of certain female tribal members. We held that the Indian Civil Rights Act, *supra*, did not imply a private cause of action to redress violations of the statutory Bill of Rights contained in the Act, and that therefore the validity of the tribal ordinance regulating membership could not be reviewed in federal court. It seems to me that this holding, relating as it did to the relationship between the right of a Tribe to regulate its own membership and the claims of those who had been denied membership, is quite distinguishable from a claim on the part of a non-Indian that a tribal court has exceeded the bounds of tribal jurisdiction as enunciated in such decisions of this Court as *Montana* v. *United States*, *supra*. As JUSTICE WHITE pointed out in his dissent in that case, 436 U. S. 72–73, "the declared purpose of the Indian Civil Rights Act . . . is 'to ensure that the American Indian is afforded the broad constitutional rights secured to other Americans.' But as the Court also pointed out in its opinion, Congress entertained the additional purpose of promoting 'the well-established federal "policy" of furthering Indian self-Government.'" 436 U. S. 49, 62. The facts as well as the holding of *Santa Clara Pueblo*, *supra*, satisfy me that Congress' concern in enacting the Indian Civil Rights Act was to enlarge the rights of individual Indians as against the Tribe while not unduly infringing on the right of tribal self-government. The fact that no private civil cause of action is to be implied under the Indian Civil Rights Act, *Santa Clara Pueblo*, *supra*, does not to my mind foreclose the likelihood that federal jurisdiction may be invoked by one who claims to have suffered from an excess beyond federally prescribed jurisdictional limits of an Indian tribal court on the basis of federal common law. See, *e. g.*,

Illinois v. *City of Milwaukee*, 406 U. S. 91, 99–100 (1972). We said in *Oliphant* v. *Suquamish Indian Tribe*, *supra*:

> "'Indian law' draws principally on the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them."

I think a fair reading of all of our case law on this subject could lead to the conclusion that even though the Indian Civil Rights Act affords no private civil cause of action to one claiming a violation of its terms, "Indian law" as of the time that law was enacted afforded a basis for review of tribal court judgments claimed to be in excess of Tribal Court jurisdiction.

Respondents insist that under Rule 44.2 of this Court a supersedeas bond should have accompanied applicant's request for a stay. That rule provides:

> "If the stay is to act as a supersedeas, a supersedeas bond shall accompany the motion and shall have such surety or sureties as said judge, court or justice may require."

I do not think that the rule is by its terms applicable to this case. The term "supersedeas" to me suggests the order of an appellate court having authority to review on direct appeal the judgment which is superseded. All of the proceedings in the various federal courts in this case have, of course, sought no direct review of the Tribal Court judgment, which simply is not provided for by statute at all, but collateral relief. The District Court did not review the judgment of the Indian Tribal Court by way of appeal, but instead enjoined its enforcement.

It may well be that under the Federal Rules of Civil Procedure respondents would have a plausible argument to make

to the District Court that an injunction bond serving somewhat the same purposes as a supersedeas bond should be required by that court so long as its injunction remains in effect. Whether such a bond should be required of either party in this case, and whether in particular it should be required of applicant Lodge Grass School District No. 27 in view of the fact that apparently under Montana law a public body is not required to post a supersedeas bond in a state court proceeding, is an issue best left in the first instance to the District Court.

As to whether, if I am right in thinking that this Court may well decide that Tribal Court judgments are subject to federal court review for claims of jurisdictional excess, applicants would necessarily prevail, I express no opinion. The District Court held in their favor on this point, but the Court of Appeals for the Ninth Circuit found no necessity for reaching it since it held that there was no federal jurisdiction to consider it. The District Court in its opinion quoted F. Cohen, *Handbook of Federal Indian Law*, 253 (1982 Ed.), to the effect that "the extent of Tribal civil jurisdiction over the non-Indian is not fully determined." The District Court, in reaching the conclusion it did, relied on the following language from our opinion in *United States* v. *Montana*:

> "To be sure, Indian Tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on the Reservations, even on non-Indian fee lands. A Tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the Tribe or its members, through commercial dealings, contracts, leases, or other arrangements. A Tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, *supra*, 450 U. S., at 565–566.

The court concluded that exercise of tribal jurisdiction over an injury to a tribal member occurring on non-Indian owned fee land within the boundaries of the Reservation was not within the description of Indian tribal jurisdiction. I express no opinion as to what the correct answer to this inquiry may be. I do think its correct decision is of far less importance than the correct decision of the more fundamental question of whether there is any federal court review available to non-Indians for excesses of Tribal Court jurisdiction.

It is so ordered.